

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
~~26632~~-s41G BY ALBERT & DENISE WARFEL)
22632-s41G

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On May 4, 1979, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation by Albert and Denise Warfel. This application seeks two (2) cubic feet per second up to 85 acre-feet per year for new sprinkler irrigation of 30 acres more or less located in the NE1/4 and the NW1/4 of Section 10, Township 1 South, Range 5 West, all in Jefferson County. The Applicant claims the right to use the aforesaid quantity of water from May 1 to July 1, inclusive, of each year, and from September 1 to October 30, inclusive, of each year. The source of supply is claimed to be Fish Creek, a tributary of the Jefferson River, and the water is proposed to be diverted at a point in the SW1/4 SE1/4 NW1/4 Section 10, Township 1 South, Range 5 West, all in Jefferson County. The pertinent portions of this application were duly published in the Montana Standard, a newspaper of general circulation printed and published in Butte, Montana, and in the Madisonian, a newspaper of general circulation printed and published in Virginia City, Montana.

On October 18, 1979, an objection to the granting of this application was filed with the Department of Natural Resources

and Conservation on behalf of the Montana Power Company. That objection alleges generally that the proposed appropriation is from Fish Creek in Jefferson County, Montana, and upstream from the Canyon Ferry, Hauser, Holter, Black Eagle, Rainbow, Ryan, Cochrane and Marony dams and reservoir impoundments, and that there is insufficient unappropriated water available for the proposed use without adversely affecting the downstream water rights of the Montana Power Company and other senior appropriators. On September 19, 1979, an objection to the granting of this application was filed with the Department on behalf of the Bureau of Reclamation of the United States of America. The Bureau of Reclamation alleges generally that unappropriated water is not available throughout the period of appropriation requested by the Applicant, and that any new irrigational development will adversely affect the prior rights of the Bureau of Reclamation's Helena Valley and Canyon Ferry units. On October 11, 1979, an objection to the granting of this application was filed by Gene Hanson. Mr. Hanson sets forth the existence of water rights which he claims to own or control, and further alleges that there is insufficient water in Fish Creek to satisfy the Applicant's claims without working injury to these rights. On November 6, 1979, an objection to the granting of this application was filed with the Department by William and Francis McGee. This objection sets forth certain water rights claimed to be owned or controlled by the Objector, and alleges that there is an inadequate amount of water in the source of supply for Applicant to divert without working injury to these

rights. On November 5, 1979, an objection to the granting of this application was filed with the Department by Hubert and Marie Hays. This objection again sets forth the existence of claimed water rights on behalf of the Objector, and alleges that there is insufficient water in Fish Creek to meet applicant's claims without working injury to these rights. On November 13, 1979, an objection to the granting of this application was filed with the Department by Tom Henderson. This objection again sets forth certain water rights alleged to be owned or claimed by the objector, and further alleges that there is not sufficient water in Fish Creek for the present water users on the stream. On October 11, 1979, an objection to the granting of this application was filed with the Department by Jewell and Peggy Warner. This objection again sets forth the existence of water rights claimed to be owned by the Objector, and further alleges that the waters of Fish Creek are insufficient for present water users.

On June 8, 1981, a hearing in the above-entitled matter was set for July 6, 1981, in Whitehall, Montana. Previous to the hearing, this Hearing Examiner was advised by the Applicant Warfel that he would be unable to attend or otherwise appear at a hearing in this matter until at least November 1981. The Applicant lives in Pennsylvania, and referenced a lack of financial resources as a reason for his inability to appear at the hearing scheduled in this matter. Whereupon, on July 13, 1981, an Order was entered authorizing the objectors to this matter to except or otherwise object to such a lengthy

continuance, and also directing the Applicant to set forth a date for the hearing in this matter upon penalty of dismissal of the application. The Applicant did not respond, and the Department through its officials objected to such a continuance, and Montana Power Company by motion of July 23, 1981, also accepted to any such lengthy postponement. (See Exhibit A)

The Hearing Examiner notes Montana Power Company's objection based on the potential prejudice accruing to it by this delay, but does not accord it any controlling weight. The continuance or postponement requested in this matter merely preserves the status quo, and the potential untimely disposition of this particular application is not likely to significantly disrupt Montana Power Company's operations nor is it likely to substantially hinder them in the presentation of their cause. However, Montana Power Company's allegations of lack of diligence, which are joined in by the Department in its own behalf, are germane. It is not necessary, however, to specifically detail matters of diligence herein, because the Applicant's have failed to respond to the Order entered in this matter.

Generally, however, the Montana Water Use Act adopts and codifies the common law notion of an inchoate water right. That is, a permit for a new water use merely licenses a prospective appropriator to initiate his water use. The Act also authorizes the Department to forecast diligence considerations prospectively and to specifically tailor them to the individual project. MCA 85-2-312(2) provides that:

"(t)he Department may limit the time for commencement of the appropriation works, completion of construction, and application of the water to the proposed beneficial use. In fixing these time limits, the Department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use."

Upon completion of the appropriation countenanced by the permit with reasonable diligence, the appropriator is entitled to relate his water use back to a priority date set by the filing of the application. MCA 85-2-315(1) provides in part that:

"(u)pon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the Department that the appropriation has been properly completed. The Department may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right."

While these statutory provisions speak to diligence upon the part of the applicant after the issuance of a provisional permit, it cannot be supposed that the legislature intended to in all cases excuse dilatory conduct upon the part of an applicant prior to the hearing itself. The purpose of recognizing inchoate rights is to assure the prospective appropriator of a certain priority date for the implementation of water development plans that necessarily involve some degree of time and expense. See Department of Nat. Res. and Conser. v. Intake Water Co., 171 Mont. 416, 558 P.2d 1110 (1976). Reasonable diligence is the talisman of the privilege of relating the completed appropriation back to the initiation of the same. Indeed, the legislature has

set forth specifically delimited time frames during which any application is to be disposed of. While the applicant is not of course to be charged with delays engendered by the Department, these time schedules nonetheless reflect at least in part an intention upon the part of the legislature to prohibit prospective appropriators from essentially escrowing water for future beneficial uses. Waters may be reserved in such fashions only by state or other political subdivisions. MCA 85-2-316.


These considerations, coupled with Applicant's failure to designate a hearing date, warrant the dismissal of this application so that the waters countenanced by this permit can be put to use by other prospective water users. While matters incidental to the enterprise itself that cannot be reasonably avoided may excuse utmost diligence in some circumstances, matters purely personal to the appropriator such as the asserted lack of financial resources cannot work an exception to the rule of timely and steadfast completion of an appropriation in these circumstances.

"One should not be permitted to play the dog in the manger with water he does not or cannot use for beneficial purposes when other lands are crying for water. It is to the interest of the public that every acre of land in this state susceptible to irrigation shall be irrigated." Allen v. Petrick, 69 Mont. 373, 379, 222 P. 451 (1922).

Equally one cannot lay claim to a certain priority date and hold in abeyance the application of the state's water resources to beneficial uses without proceeding with reasonable diligence in the completion of the appropriation.

WHEREFORE, Application for Beneficial Water Use Permit No. 22632-s41G by Albert and Denise Warfel is hereby denied and dismissed in its entirety, without prejudice to the named Applicants to reapply to the Department for another water use permit at some future date.

DONE this 10th day of August, 1981.


Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449-3962